

EX-3 670

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 12-0052
)
 Lanzie Carroll Horton, Jr., an individual,)
 a/k/a Junior Horton, d/b/a Horton's Pups,)
)
 Respondent) **Decision and Order**

PROCEDURAL HISTORY

On November 7, 2011, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, during the period November 9, 2006, through September 30, 2009, Lanzie Carroll Horton, Jr., operated as a "dealer," as that term is defined in the Regulations, without having obtained an Animal Welfare Act license, in

willful violation of 9 C.F.R. § 2.1(a)(1).¹ On November 28, 2011, Mr. Horton filed an answer denying the material allegations of the Complaint.

On June 4, 2012, the Administrator filed Complainant's Motion for Summary Judgment; Declaration of Dr. Elizabeth Goldentyer [hereinafter Motion for Summary Judgment]. On July 24, 2012, Mr. Horton filed Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment in which Mr. Horton asserted the Administrator's Motion for Summary Judgment must be denied because two genuine issues of material fact remain in this proceeding: (1) the issue of whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through June 8, 2008, were willful violations; and (2) the issue of whether Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009.

On January 2, 2013, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order in which the ALJ: (1) concluded Mr. Horton violated 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through September 30, 2009; (2) reached no determination regarding the willfulness of Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1); (3) accepted as true Mr. Horton's assertion that, since November 2008, he ceased any actions violative of the Animal Welfare Act;² (4) ordered

¹Compl. at 2-8 ¶ 3.

²Despite accepting as true, Mr. Horton's assertion that, since November 2008, he ceased actions violative of the Animal Welfare Act (ALJ's Decision and Order at 5 ¶ 12), the ALJ concluded that Mr. Horton violated 9 C.F.R. § 2.1(a)(1) on or about

(continued...)

Mr. Horton to cease and desist from operating as a dealer without an Animal Welfare Act license; and (5) assessed Mr. Horton a \$14,430 civil penalty.³

On February 28, 2013, the Administrator filed Complainant's Petition for Appeal. On March 1, 2013, Mr. Horton filed an Appeal Petition, and on March 14, 2013, the Administrator filed Complainant's Response to Respondent's Appeal Petition. On March 20, 2013, Mr. Horton filed a response to Complainant's Petition for Appeal, and on March 25, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Based upon a careful consideration of the record, I adopt the ALJ's Decision and Order, except I increase the civil penalty assessed by the ALJ from \$14,430 to \$191,200 and I do not conclude that Mr. Horton violated 9 C.F.R. § 2.1(a)(1) on or about December 27, 2008, through January 17, 2009, and on or about September 30, 2009.

Findings of Fact and Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.

²(...continued)

December 27, 2008, through January 17, 2009, and on or about September 30, 2009 (ALJ's Decision and Order at 3 ¶¶ 8-9).

³ALJ's Decision and Order at 2-6 ¶¶ 6-10, 12, 14-16.

2. Lanzie Carroll Horton, Jr., a/k/a Junior Horton, d/b/a Horton's Pups, is an individual whose business is in Millersburg, Ohio, and was previously in Hillsville, Virginia.

3. On or about November 9, 2006, through September 27, 2007, Mr. Horton, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, transported, sold, or negotiated the sale of 914 dogs for use as pets to a retail pet store, Pauley's Pups, in violation of 9 C.F.R. § 2.1(a)(1).

4. On or about June 8, 2008, Mr. Horton, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in commerce, for compensation or profit, delivered for transportation, transported, sold, or negotiated the sale of 42 dogs for use as pets to a licensed dealer, Ervin Raber, in violation of 9 C.F.R. § 2.1(a)(1).

5. Mr. Horton operates a large business.

6. The gravity of Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) is great.

7. Mr. Horton demonstrated a lack of good faith.

8. Mr. Horton has a history of previous violations.

9. An order instructing Mr. Horton to cease and desist from operating as a dealer without having obtained an Animal Welfare Act license is appropriate.

10. Assessment of a \$191,200 civil penalty against Mr. Horton is warranted in law and justified by the facts.

The Administrator's Petition for Appeal

The Administrator raises three issues in Complainant's Petition for Appeal. First, the Administrator contends the ALJ's failure to identify Mr. Horton's violations as willful, is error (Complainant's Pet. for Appeal at 5).

The Administrator does not indicate how a finding that Mr. Horton's violations were willful would affect the disposition of this proceeding. The Administrator seeks issuance of a cease and desist order and assessment of a civil penalty. Under the Animal Welfare Act, willfulness is not relevant either to the issuance of a cease and desist order or to the assessment of a civil penalty. Therefore, the disposition of this proceeding would not be affected by a finding that Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful. I find the ALJ's failure to determine whether Mr. Horton's violations were willful, is not error, and I decline to remand this proceeding to the ALJ to determine whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful.

Second, the Administrator contends the ALJ's assessment of a \$14,430 civil penalty against Mr. Horton, is error and recommends assessment of a civil penalty of at least \$1,792,500 against Mr. Horton (Complainant's Pet. for Appeal at 5-9).

Administrative law judges and the Judicial Officer have significant discretion when imposing a civil penalty under the Animal Welfare Act. During the period when I find Mr. Horton violated the Animal Welfare Act, the Secretary of Agriculture was authorized to assess a civil penalty of not more than \$3,750 for each violation of the

Regulations (7 U.S.C. § 2149(b)).⁴ The United States Department of Agriculture's sanction policy provides that administrative law judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). The Administrator recommends assessment of a civil penalty of at least \$1,792,500 against Mr. Horton.⁵ However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.⁶

⁴Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from \$2,750 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)).

⁵Complainant's Pet. for Appeal at 4; Mot. for Summ. J. at 22-23.

⁶*In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, (continued...)

The Animal Welfare Act requires the Secretary of Agriculture to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations when determining the amount of the civil penalty to be assessed.⁷

During the period November 9, 2006, through June 8, 2008, Mr. Horton sold 956 dogs. Based on the number of dogs sold by Mr. Horton during this 19-month period, I find Mr. Horton operates a large business.

The identification of persons who operate as dealers under the Animal Welfare Act is vital to the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations. Identification of persons who operate as dealers is most easily accomplished if each person who intends to operate as a dealer applies for and obtains an Animal Welfare Act license. Mr. Horton's failure to apply for and obtain an Animal Welfare Act license before operating as a dealer thwarted the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations; therefore, I find the gravity of Mr. Horton's violations is great.

⁶(...continued)

89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

⁷7 U.S.C. § 2149(b).

Moreover, an ongoing pattern of violations over a period of time establishes a violator's history of previous violations even if the violator has not been previously found to have violated the Animal Welfare Act.⁸ Mr. Horton's multiple violations of 9 C.F.R. § 2.1(a)(1) during a 19-month period constitutes an ongoing pattern of violations that establishes a history of previous violations for purposes of 7 U.S.C. § 2149(b).

Mr. Horton's lack of good faith is demonstrated by his pattern of violations over a 19-month period and particularly by his sale of 42 dogs without an Animal Welfare Act license after he was notified by Dr. Elizabeth Goldentyer in November 2007 that operating as a dealer without an Animal Welfare Act license is a violation of the Animal Welfare Act and the Regulations.⁹

After examining all the relevant circumstances in this proceeding, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), I agree with the Administrator that the \$14,430 civil penalty assessed by the ALJ, which equates to approximately \$15 for each dog that Mr. Horton sold in violation of 9 C.F.R. § 2.1(a)(1), would not be a sufficient civil penalty to deter future violations of the Animal Welfare Act and the Regulations by Mr. Horton and other potential violators. Instead, Mr. Horton and other potential

⁸*In re Sam Mazzola*, 68 Agric. Dec. 822, 827 (2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re William Richardson*, 66 Agric. Dec. 69, 88-89 (2007); *In re Jerome Schmidt*, 66 Agric. Dec. 159, 207 (2007); *In re Karen Schmidt*, 65 Agric. Dec. 971, 984 (2006); *In re For The Birds, Inc.*, 64 Agric. Dec. 306, 359 (2005).

⁹Mot. for Summ. J. CX 6, CX 16; Decl. of Elizabeth Goldentyer, D.V.M., at 2 ¶ 6.

violators may view a civil penalty of approximately \$15 for each dog sold in violation of 9 C.F.R. § 2.1(a)(1) as merely a cost of doing business. I conclude a cease and desist order and assessment of a \$191,200 civil penalty (\$200 for each dog that Mr. Horton sold in violation of 9 C.F.R. § 2.1(a)(1)) are appropriate and necessary to ensure Mr. Horton's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Third, the Administrator contends the ALJ's exclusion of four of the Administrator's exhibits, identified as CX 2-CX 5, is error (Complainant's Pet. for Appeal at 10).

The ALJ, without explanation, granted Mr. Horton's June 25, 2012, motion to exclude four exhibits listed on the Administrator's May 7, 2012, list of witnesses and exhibits (ALJ's Decision and Order at 5 ¶ 12). I infer the ALJ agreed with Mr. Horton's contention that these exhibits, which concern Mr. Horton's violations of the Code of Virginia, are not relevant to this proceeding. Based on the very limited record before me, I agree with the ALJ that CX 2-CX 5 are not relevant to this proceeding, and I reject the Administrator's contention that the ALJ's exclusion of CX 2-CX 5, is error.

Mr. Horton's Appeal Petition

Mr. Horton contends the ALJ improperly granted the Administrator's Motion for Summary Judgment as genuine issues of material fact remain in this proceeding.

Mr. Horton asserts he identified those genuine issues of material fact in Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment. (Mr. Horton's Appeal Pet. at 7-8.)

On July 24, 2012, Mr. Horton filed Respondent's Memorandum in Opposition to Complainant's Motion for Summary Judgment in which Mr. Horton asserted the Administrator's Motion for Summary Judgment must be denied because two genuine issues of material fact remain in this proceeding: (1) the issue of whether Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1), during the period November 9, 2006, through June 8, 2008, were willful violations; and (2) the issue of whether Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009.

As discussed in this Decision and Order, *supra*, willfulness is not relevant to this proceeding, and I do not conclude that Mr. Horton's violations of 9 C.F.R. § 2.1(a)(1) were willful. Therefore, I reject Mr. Horton's contention that the willfulness of his violations of 9 C.F.R. § 2.1(a)(1) is a genuine issue of material fact remaining in this proceeding. Moreover, I do not conclude that Mr. Horton operated as a dealer during the period December 27, 2008, through September 30, 2009. Therefore, I reject Mr. Horton's contention that the nature of his operations during the period December 27, 2008, through September 30, 2009, is a genuine issue of material fact remaining in this proceeding.

For the foregoing reasons, the following Order is issued.

ORDER

1. Lanzie Carroll Horton, Jr., and his agents, employees, successors, and assigns, directly or indirectly through any corporate or other device or person, shall cease and desist from operating as a dealer without having obtained an Animal Welfare Act license. Paragraph 1 of this Order shall become effective upon service of this Order on Mr. Horton.

2. Lanzie Carroll Horton, Jr., is assessed a \$191,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing, Regulatory, and Food Safety Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Mr. Horton. Mr. Horton shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0052.

RIGHT TO JUDICIAL REVIEW

Lanzie Carroll Horton, Jr., has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Mr. Horton must seek judicial review within 60 days after entry

of the Order in this Decision and Order.¹⁰ The date of entry of the Order in this Decision and Order is April 5, 2013.

Done at Washington, DC

April 5, 2013

[REDACTED]
William G. Jenson
Judicial Officer

¹⁰7 U.S.C. § 2149(c).